No. 83-1937

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES A. ARNOLD, JR.,

Petitioner,

vs.

BURGER KING CORPORATION
and
FICKLING ENTERPRISES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF OF RESPONDENTS BURGER KING CORPORATION AND FICKLING ENTERPRISES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the District Court abuse its discretion under Christiansburg Garment Co. v. EEOC in awarding the prevailing defendants in a Title VII action reasonable attorneys' fees?

2. Did the District Court abuse its discretion under Christiansburg in fixing the amount of attorneys' fees awarded to the prevailing defendants in a Title VII action?

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TABLE OF AUTHORITIES

CASES:

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) i,2,3,4

General Talking Pictures Corp. v. Western Elec. Co., 304 U.S. 175 (1938). 4

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National Labor Relations Board v. Waterman S. S. Corp., 309 U.S. 206 (1940) 4

Trustees of the Internal Improvement Fund v. Greenough, 105 U.S. 527 (1882). 5

RULES:

Rules of the United States Court of Appeals for the Fourth Circuit Rule 7. 2

OTHER AUTHORITIES:

Friendly, Indiscretion about Discretion, 31 Emory L.J. 760 (1982). 6,7

Moore's Federal Practice, Vol. 13 p. SC17-22. 5

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Burger King Corporation and Fickling Enterprises oppose the Petition for Writ of Certiorari seeking to review the decision of the United States Court of Appeals for the Fourth Circuit entered in this case on October 5, 1983.

STATEMENT OF THE CASE

Respondents refer the Court to the summary of facts and proceedings below contained in the opinion of the Fourth Circuit Court of Appeals in this action, reprinted in the Appendix to the Petition, A.2-6. When this case reached the Court of Appeals, Petitioner was unrepresented and arguments on the merits of the district court's findings were submitted on informal briefs. Rule 7(d), Rules of the United States Court of Appeals for the Fourth Circuit. Thereafter, Professor Pollitt agreed to represent the Petitioner and, at the Court's specific request, the parties submitted briefs and oral arguments on the issues of: what standard should be applied in determining whether a case is frivolous under Christiansburg

Garment Co. v. EEOC, 434 U.S. 412 (1978); and, what standard should be applied in determining the amount of fees to be awarded? After the decision of the Fourth Circuit, Petitioner sought a rehearing and suggested a rehearing en banc. Both were denied on February 28, 1984.

ARGUMENT

THE TRIAL COURT'S DETERMINATIONS OF THE APPROPRIATENESS AND AMOUNT OF AN AWARD OF ATTORNEYS' FEES DO NOT PRESENT ANY SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT OF CERTIORARI.

As this Court held in Christiansburg, supra, the determination that a case is frivolous, unreasonable or without foundation is a matter within

the sound discretion of the district court.[1] Such a determination is based on issues which are solely factual and therefore not usually appropriate for review via a writ of certiorari. National Labor Relations Board v. Waterman S. S. Corp., 309 U.S. 206 (1940); General Talking Pictures Corp. v. Western Elec. Co., 304 U.S. 175 (1938). This Court has frequently recognized that an award of costs is not an appropriate matter for appellate review.

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[1]If the writ is granted, respondents will seek affirmance in the alternative on the ground that the dual, Christiansburg standard is inapplicable where, as here, the defendants were acting in furtherance of the strong public policies prohibiting discrimination, (in this case, sexual harassment).

> The court below should have considerable latitude of discretion on the subject [of awarding costs, including counsel fees], since it has far better means of knowing what is just and reasonable than an appellate court can have.

Trustees of the Internal Improvement Fund v. Greenough, 105 U.S. 527, 537 (1882).

Since these issues are purely factual, Petitioner's assertion that decisions from other circuits are in conflict with the standards used by the Fourth Circuit is not well founded.

> Nor will differences between two circuits likely be accepted as a sufficient conflict 'if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved.'

13 Moore's Federal Practice ¶817.21, p. SC17-22, citing Harlan, "Manning The Dikes" 13 Record NYCBA 541, 552 (1958).

In a recent article, Judge Friendly

examines in detail the problem of appellate review of acts of trial court discretion. Friendly, Indiscretion about Discretion, 31 Emory L.J. 760 (1982). He concludes that there are many types of discretion and that they should not all be subject to the same standard of review.

> In those situations 'where the decision depends on first-hand observation or direct contact with the litigation,' the trial court's decision 'merits a high degree of insulation from appellate revision.' [citation omitted]

Id. at 783.

The policy reason for this "high degree of insulation" is stated as follows:

> Another principle supporting deference to rulings of the trial court is the absence of the benefits that ordinarily flow from appellate review in establishing rules

> that will govern future cases. This is true in the frequent situations described by Judge Stevens, as he then was, where the factors 'are so numerous, variable and subtle that the fashioning of rigid rules would be more likely to impair [the trial judge's] ability to deal fairly with a particular problem than to lead to a just result.' [citations omitted].

Id. at 760.

Because of the myriad factors involved in determining whether or not a case is frivolous, a decision in this case will be of little prospective value. As the Court of Appeals in this case concluded after consideration of numerous cases, treatises and law review articles cited to it by the parties:

> The one common strand running through all these cases is that assessment of frivolousness and attorneys' fees are best left to the sound discretion of the

> trial court after a thorough evaluation of the record and appropriate factfinding. [citations omitted].

A.12-13.

CONCLUSION

> Vacating a fee award such as this and remanding for further explanation can serve only as an invitation to losing [parties] to engage in what must be one of the least socially productive types of litigation imaginable: appeals from awards of attorney's fees .... Where, as here, a district court has awarded a fee that comes within the range of possible fees that the facts, history, and results of the case permit, the appellate court has a duty to affirm the award promptly.

Hensley v. Eckerhart, ___ U.S. ___, 76 L.Ed.2d 40, 56 (1983) (Brennan, J., concurring in part and dissenting in part). Accordingly, the petition should be denied.

Respectfully submitted,

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